

**DUST DISEASES TRIBUNAL AMENDMENT (CLAIMS  
RESOLUTION) ACT 2005 section 42**

DDT No 133 of 2009

Between

JAMES JOHN WINTERBINE  
Plaintiff

STATE OF NEW SOUTH WALES  
First Defendant/ Cross Claimant on First Cross Claim

HOLYMAN SHIPPING COMPANY PTY LTD  
Second Defendant

STATE OF QUEENSLAND  
Third Defendant

CHEMETALL (AUSTRALIA) PTY LTD  
Fourth Defendant – DISCONTINUED

NOVACOALE AUSTRALIA PTY LIMITED  
Fifth Defendant

TNT SHIPPING AND DEVELOPMENT PTY LIMITED  
Sixth Defendant

TOWER INSURNACE LIMITED  
Seventh Defendant – DISCONTINUED

COMCARE  
Eighth Defendant

WORKCOVER QUEENSLAND  
Ninth Defendant

WALLABY GRIP LIMITED  
Cross Defendant to First Cross Claim

**DETERMINATION OF APPORTIONMENT**

The proceedings which have been referred to me for a determination of apportionment as between the defendants, the State of New South Wales ["SNSW"], Holyman Shipping Company Pty Ltd ["Holyman"], the State of Queensland ["QLD"], Chemetall – discontinued, Novacoale Australia Pty Limited ["Novacoale"], TNT Shipping and Development Pty Limited ["TNT"], Tower Insurance – discontinued, Comcare and WorkCover Queensland ["WCA"] and the cross defendant, Wallaby Grip Limited ["WGL"] arise from a claim made for compensation for contracting asbestosis and asbestos related pleural disease brought by James John Winterbine ["the Plaintiff"].

The Plaintiff who was born on 1 September 1934 was diagnosed with asbestosis and ARPD sometime after July 2008. A Second Amended Statement Claim was filed on 5 March, 2010 and an amended Statement of Particulars was filed in the Dust Diseases Tribunal on 18 January 2010. The claim is made under the Claims Resolution Process.

It is alleged by the Plaintiff that he was employed by the NSW Government Railways between 1950 and 1956 at Cardiff. He commenced and completed his apprenticeship as a fitter and machinist and in the course of that employment worked on locomotive repairs and new frame construction. He refers in detail to his exposure to asbestos dust and fibre in the course of this work at pages 5-8 of his amended particulars, and estimates that he was exposed daily for his entire shift whilst working full time. He left the railways in about 1956.

The Plaintiff then alleges that he joined the Union Steam Ship Company on 27 July 1957 and worked there on the TSS Taroon until 14 October 1957. This work is detailed at pages 8-9 of the particulars and is described by the Plaintiff as repair work in engine and boiler rooms. He did repair work to the boilers and was surrounded by clouds of dust in a confined space. He was then required to re-lag again using asbestos.

The Plaintiff then worked for the British Phosphate Commission between 15 October 1957 and 1 December 1959. He was at sea until 15 October 1959 and worked on a number of vessels with similar exposure to that with Union Steam Ship.

The Plaintiff then at page 9 of his particulars details similar exposure whilst working at WR Carpenters trading as American Trading and Shipping Co Pty Limited between 28 January 1960 and 25 March 19654 as a senior engineering officer.

The Plaintiff then details at page 10 of the Particulars that he was contacted by the Australian National Line ["ANL"] but was not exposed on this ship.

The Plaintiff then commenced working with the Queensland State Electricity Commission at the New Farm Power Station in late 1964 until mid to late 1965 as a shift engineer working with boilers and pipes that were in a poor state of repair. The Plaintiff was exposed to asbestos dust which would be blown into his work space by the natural ventilation creating large clouds of dust that settled on his face, hair and clothes. This occurred throughout most of his shifts at the power station.

The Plaintiff then worked for William Adams Engineering from mid to late 1965 until 1968 such work involving commissioning turbine machines and testing them, which involved exposure to asbestos dust and fibre, however he states at page 11 that this was nowhere near as much as at the other jobs.

From about 1969 to about February 1972 the Plaintiff worked for Gamlen Chemical Company as a technical services manager, firstly in Queensland and then in Sydney. Part of his duties included chemically cleaning boilers during dry dock repairs, but not every day exposure to asbestos dust and fibre occurred when this work was performed. The Plaintiff estimates that this exposure was approximately 4 hours per week.

In February 1972 the Plaintiff started work with Clutha Development as an engineering Superintendent, until about 1979. His Job included being responsible for all mechanical repairs to plant machinery and he alleges that he was exposed in a similar way to that at Union Steamships, however only when in port or dry dock – approximately 6 hours per day for 4 hours per week.

From about 1979 to 1992 the Plaintiff was employed by TNT again being responsible for all mechanical repairs to plant and machinery. He describes this exposure as similar to that at Union Steamship, however for approximately 6 hours a day for 4 days per week up until about 1983. He does however recall a fire on SS Curtis Capricorn which required asbestos removal and that he had to work around the clock to get the job finished and that the exposure was heavy for about 3 to 4 weeks.

The Plaintiff details at page 13 of his particulars that he was not exposed whilst working at TNT when working on SS TNT Carpentaria and SS TNT Capricornia as they were coal fired vessels. This was from 1983 to 1992. Prior to this time however when working on ships other workers were using oxy cutters and the engine and boiler rooms had areas covered with asbestos blankets, which were shaken when used and emanated dust which the Plaintiff inhaled.

At paragraph 4.9 of his Particulars, the Plaintiff identifies products that he used, and in particular Bells Asbestos packings, sheet jointing, asbestos tapes, cords, blankets, gloves and full length gauntlets as well as various other products.

The defendants and cross defendant were unable to agree as to apportionment of liability and the matter was referred to me by the Registrar pursuant to Clause 49(1) of the *Dust Diseases Tribunal Regulation 2007* ("the Regulations"). I have received the Tribunal file and have had regard to the Form 1 and Amended Form 1 filed by the Plaintiff and the Reply's filed by the State of NSW, Holyman, State of Queensland, TNT, Comcare and WGL..

The determination I am required to make under Section 49(4) of the Regulations is made on the assumption that all of the defendants and cross-defendants are liable. It is also solely on the basis of:

“

- (a) *the plaintiff's statement of particulars and the defendants' replies on the claim, and*

- (b) *standard presumptions as to apportionment determined by the Minister for the purposes of this clause by order published in the Gazette."*

The standard presumptions are pursuant to the *Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2007 ('the Order')* which provides that the legal basis for the apportionment between joint tort-feasors is governed by section 5 of the *Law Reform (Miscellaneous Provisions) Act 1946*.

I have had regard to the Standard Presumptions contained in section 5 of *the Order* and the Factual Considerations contained in section 3 of *the Order*. In assessing the appropriate contributions I have considered the submissions contained in the replies by the cross-claimant and the cross-defendants in the context of section 3 of *the Order*. The determination I am required to make under Section 42(2) of the Act is made on the assumption that the defendants are liable. It is also solely on the basis of:

“

- (c) *the plaintiff's statement of particulars and the defendants' replies on the claim, and*
- (d) *standard presumptions as to apportionment determined by the Minister for the purposes of this clause by order published in the Gazette."*

**In respect of the First Defendant, SNSW;**

It is submitted by SNSW that they, and all primary defendants are category 2 defendants and that WGL is category 1 defendant. They deny that they are also a Category 1 defendant, and refer my attention to footnote 11 of clause 5(2) of the Order. They accept that they ought to have known of the dangers of asbestos, but assert that they had no actual knowledge of the dangers of asbestos at the relevant times.

It is also submitted by SRA that the standard presumptions should be varied on the basis of the decisions in *State Rail Authority of NSW v Wallaby Grip Limited [1999] NSW DDT (re Rayner)* and *(Re Nikola Woelfl) State Rail Authority of NSW v Amaca Pty Limited and Wallaby Grip Limited (29 May 2006)*.

SNSW then makes alternate submissions if they are found to be both Category 1 and 2 defendants and submit that there ought be a variation of the Standard Presumptions to reduce their liability as a category 1 defendant in the relevant period by 20%.

**In respect of the Second Defendant, Holyman;**

It is submitted that all primary defendants are Category 2 defendants and that Union Shipping had no relevant knowledge of the risks associated with exposure to asbestos. The apportionment they suggest is on a time on risk basis, allowing for empty chairs.

**In respect of the Third Defendant, SQLD;**

It is submitted that the primary defendants are all Category 1 defendants and that WGL is a Category 2 defendant. Detailed and helpful submissions are made as to the "empty chair" periods on a time on risk basis. It is submitted that the empty chair period ought be absorbed by the other defendants on a pro rata basis.

It is further submitted that the intensity of exposure and the actual work days that the Plaintiff performed ought be considered in any apportionment.

**In respect of the Sixth Defendant, TNT;**

It is submitted that all primary defendants are Category 2 defendants and that WGL is a Category 1 defendant. It is submitted that their ought be no variation of the Standard Presumptions.

**In respect of the Eighth Defendant, Comcare;**

It is submitted that all the primary defendants are Category 2 and that the assessment ought be performed on a time on risk basis unless it is evident that there is a disproportionate intensity of exposure. Comcare does not submit that their ought be a variation of the Standard Presumptions.

**In respect of the cross defendant, WGL;**

It is submitted by WGL that they are a category 1 defendant. They submit that SNSW is also category 1 defendant and that the liability in that category ought be apportioned at 50% to the employer and 50% between the suppliers. Of the Category 1 defendants they submit that there ought be the maximum variation of 20 % against the SNSW given it's size and sophistication and knowledge.

They submit that all the primary defendants are Category 2 defendants ( including SNSW). They again submit that the maximum variation ought be made against the SNSW due to their size, sophistication and knowledge.

**STANDARD PRESUMPTIONS**

In accordance with the standard presumptions, it is common amongst the parties that the relevant period in the index contained within Section 5 of the Order that the Plaintiff's exposure where there are both category 1 and 2 defendants (SNSW and WGL) falls within Period A. The standard presumption is therefore

Category 1 : 75 percent

Category 2 : 25 percent

Each of the parties agree that WGL is category 1 defendants and all the primary defendants are category 2 defendants. The areas of dispute are whether SRA is also a category 1 defendant and whether there ought be any variation of the Standard Presumptions

The Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2005, Schedule 1, Clause 2 quotes from section 5 of the Law Reform (Miscellaneous Provisions) Act 1946 as the legal basis for the approach to apportionment.

Clause 2(2) of Schedule 1 of the Order is as follows:

*(2) The phrase "responsibility for the damage" in section 5 (2) requires a comparison of the relative culpability of each tortfeasor in causing the damage. Alternatively put, the Court in making an apportionment is engaged in a consideration of the relative blameworthiness and causal potency of the negligence of each party. These contribution provisions have become notorious for the conceptual and practical difficulties they engender. In practical terms, in most cases a broad-brush approach is undertaken. The aim is to arrive at an apportionment which is "...just and equitable..."*

Further important submissions have been made by the parties as the Plaintiff suffers from an indivisible condition and that there are parties who have been sued and then discontinued against and that there will be some empty chairs.

Clause 3 (8) of the Order provides as follows;

*"Where the disease is a divisible disease (i.e. asbestosis or pleural disease), the independent Contributions Assessor will first determine (on the basis of the papers) the existence of any separate periods of exposure. A determination will then be made of what proportion of the whole, each separate period of exposure bears having regard to the number of such periods, the length of each such period, and the duration of and intensity of exposure to asbestos within each period....the Contributions Assessor will then apply to each separate period (our emphasis) the proportion set out in the table..."*

Holyman is a body corporate and was formerly known as Union Steamship Company of Australia. The third defendant, QLD is the successor at law to the Queensland State Electricity Commission and is liable for the acts and omissions alleged to have occurred as the operator of the New Farm Power Station. Comcare, the eighth defendant, assumes the liabilities of the asbestos related liabilities of the Commonwealth.

The fifth defendant, Novacole was formerly Clutha Developments Pty Ltd whom I note have not filed a Reply. I further note that whilst there has been no reply filed for the ninth defendant, WCA the second amended Statement of Claim alleges that WCA were the statutory insurer for William Adams Engineering Ltd and Gamlen.

### **APPORTIONMENT AS BETWEEN DEFENDANTS**

I am of the view that SRA ought be classified as both a category 1 and 2 defendant. Whilst I accept that there is no allegation in the pleadings against them as occupiers so as to bring them into category 2, in my view they were at all relevant times users of asbestos, asbestos products, plant or equipment which contained asbestos.

This in my view is the intention of the standard presumptions, specifically Note 11 to Clause 5 section 2(b) which illustrates a category of installer as described in section 2(a) as follows:

*“11 For example, the category of installer would include the designer and manufacturer of particular plant or equipment which included asbestos as part of its design, as well as a company which is engaged to install the plant in accordance with the manufacturer’s instructions.”*

It seems to me that this footnote contemplates the situation that has arisen in this claim, in that SRA were involved in the use of products which contain asbestos as described in the affidavit of Mr Woelfl sworn 16 April 1998, which was attached to the Reply filed on behalf of WGL. Thus it would appear to me to not be just and equitable exclude SRA from a liability in category 1 in addition to their liability in category 2.

In accordance with the standard presumptions, it is common amongst the parties that the relevant period in the index contained within Section 5 of the Order that the Plaintiff’s exposure where there are both category 1 and 2 defendants (SNSW and WGL) falls within Period A. The standard presumption is therefore

Category 1 : 75 percent

Category 2 : 25 percent

Clause 5 section 2 (4) of *the Order* state that each defendant in either category is to be treated as equal in contribution to the percent share of the category unless the Contributions Assessor is satisfied that a variation ought apply.

Extensive submissions have been made by the parties as to the variations that I ought make and I have had regard to those submissions.

In assessing the relative blameworthiness and causal potency of each of these defendants, I am persuaded to vary the standard presumption from equal shares, and to apportion the liability on a time on risk basis.

On this basis the Plaintiff's employment on a time on risk basis is;

SNSW	1,410 days	26.52%
Holyman	81 days	1.52%
Comcare	758 days	14.26%
American Trading Co	1381 days	25.98%
SQLD	190 days	3.57%
Workcover ( W Adams)	15 days	0.28%
Workcover (Gamlen)	71 days	1.34%
Novacoale	846 days	15.91%
TNT	564 days	10.61%

Of the 26.52% apportioned to SNSW, that must then be apportioned between SNSW and WGL.

Category 1

SNSW	$26.52\% \times 0.75 \times 0.5$	9.94%
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WGL	$26.52 \times 0.75 \times 0.5$	9.94%
Category 2		
SNSW	$26.52 \times 0.25$	6.63%

I therefore determine that the apportionment is as follows (rounded);

<b>SNSW</b>	<b>16.57%</b>
<b>Holyman</b>	<b>1.52%</b>
<b>SQLD</b>	<b>3.57%</b>
<b>Novacoale</b>	<b>15.91%</b>
<b>TNT</b>	<b>10.61%</b>
<b>Comcare</b>	<b>14.26%</b>
<b>WCA</b>	<b>1.62%</b>
<b>WGL</b>	<b>9.94%</b>
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	<b>74 %</b>

The remaining 26 % relates to the empty chair in respect of American Trading Company

I have not been asked to determine a single claims manager but noting there has not been agreement, if asked I would appoint SNSW as single claims manager pursuant to s.61(3)(b) of *the Regulations*.

Dated : 7 May 2010

**WENDY STRATHDEE**

Contributions Assessor